ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

AF 11-0244

IN RE THE RULES FOR ADMISSION TO THE BAR OF THE STATE OF MONTANA

The following are comments in response to the Montana Supreme Court's April 20, 2016 Order, which requested public comment on the ad hoc committee's recommendation to change the passing score of the Montana bar exam from 270 to 266.

I am an active member of the Montana bar. I am an associate in a two-attorney firm in Livingston, Montana. Unlike many who enter the practice, I did not always aspire to become an attorney. Those who know me would be surprised to learn that, until shortly before working towards admission to law school, I never thought myself competitive enough to practice law. The profession simply was not a consideration for me until I found myself stuck in a dead-end career as a microbiologist in a highly specialized sub-field. Once I decided on a career in law, I worked hard to first obtain a certificate in paralegal studies, then earn a score on the LSAT high enough to grant me admission to any law school in the region, and eventually start at the University of Montana School of Law. I had several reasons for choosing UMSL over regional competitors such as Gonzaga, despite offers of

partial scholarships from other schools. One of my primary reasons was the bar pass rate. Comparing Montana's pass rate to other regional schools, combined with my desire to remain in Montana to practice, there was simply no reason to leave the state.

I did well in law school. I was active in student groups, and made friends with classmates, professors, and administrators. I did not realize what was missing in my first career until I started law school: I felt as though I found the profession in which I belonged. That was a feeling I never felt in any science lab. I used law school to explore various areas of practice and finally decided that general practice would provide me with the most professional satisfaction. It would allow me the intellectual diversity that my first career lacked, and the most freedom to choose where in the state I would like to make my home.

Knowing the hurdle to come after graduation, I saved as much money as I could during my third year in law school. My family is not wealthy, so it has never been a thought that they might be able to help me financially in my academic pursuits. I was able to use my federal financial aid award to ensure rent was paid through bar study, and took out a $5,000 loan to supplement my expenses, and ensure I would have the money to move once I passed the exam and started working. There was no doubt in my mind that I would pass the exam. I did everything I was supposed to do: My LSAT score was in the 75th percentile nationally; My grades in

law school were good; I excelled at my internships; I took on leadership positions throughout law school; I enrolled in the top bar exam review course. There was no way I could fail. But I did. By eight points. Eight devastating points.

After overcoming the devastation not only of failing the bar exam, but the canceled job interviews, I had to start again. I had come too far to *not* be an attorney. There was no other way to pay back the $130,000 student debt I had amassed without earning a lawyer's salary (I still had substantial undergraduate debt when I started law school). Because I had no job prospects and massive debt, I had to get a cosigner for a loan in order to study for the exam again without working. I had to take out an additional $10,000 to ensure I had enough money to study, and support myself until I was unable to find a job after taking the bar exam. I studied an average of 9 hours every day for the next two months, traveled to Helena to sit for the exam, and passed.

This is the process that an average of 35% of testers must endure after every bar exam. It shatters any confidence one has in his or her abilities, and creates fissures in family bonds. It plunges well qualified, highly intelligent Montana citizens further into debt, the implications of which are far-reaching because, despite their initial classification as personal loans, bar study loans are treated as student loans for credit purposes, thereby exempting them from discharge upon bankruptcy.

My point: Failing the bar exam is a huge deal. The importance of an exam, the majority of which does not even test Montana law, should be weighed against the devastation that its failure causes.

The stated purpose of administering the bar exam is to protect consumers from incompetent attorneys. This, of course, implies that anyone obtaining a failing score on a bar exam is incompetent in his or her legal knowledge, and would therefore be a danger to his or her clients. My question is this: How does a score of 260 indicate incompetence? How can this Court be sure that a score of 266 is an accurate measure of competence without a detailed description of how that score is obtained? The organization responsible for scoring the portion of the Montana Bar Exam that is worth 50% of each examinee's score has repeatedly refused to release any information regarding how final scores are calculated. No raw scores, no extrapolation data, no formula. Because we cannot know how those scores are calculated, we cannot know the practical difference between a score of 260 and a score of 266. Without a frame of reference, scores are completely arbitrary. The difference between a 260 and a 266 could be one multiple choice question, which may or may not even parallel Montana law. We must, therefore, examine the competence of attorneys who were admitted to practice before the passing score was raised in 2013.

In his Memorandum on the bar exam, Dean Paul Kirgis plainly stated that there is no evidence that a passing score on the bar exam is an accurate measure of competence. Common sense tells us all the same. "At most, the bar exam measures cognitive legal analytical ability." *Dean's Memo*, 6. "At most." I respectfully submit that the UBE does more harm than good.

First, the exam does not test Montana law. It tests common law. If the primary reason for the exam is to ensure competence to practice in Montana, only subjects that are parallel with Montana law as practiced should be considered in the final score, which is obviously an impractical solution. For example, the exam tests heavily in criminal common law, much of which is vastly different from Montana criminal law. Is it more beneficial for a Montana prosecutor to be well-versed in common law murder statutes, or Montana's homicide statutes? In order to pass the bar exam as it is administered in Montana, examinees are forced to memorize law that they will use only during the exam. While I hesitate to say that someone who has the ability to overcome all of the hurdles necessary to sit for the bar exam would be so easily confused, such contradictions indeed have the potential to confuse issues for some examinees.

Second, The test is wholly insufficient in testing some of the most important skills necessary for successful practice: thorough research, effective communication, and organization. Instead, our careers rest on 200 multiple choice

questions. When has any judge requested from an attorney arguing in his or her court that the attorney choose the best of four inadequate defense theories? *These are the kinds of questions on which our entire careers rest.* The portion of the bar exam most applicable and analogous to practice – the MPT – is inexplicably the portion weighted the least.

In the Committee's Report, respected Missoula attorney Randy Cox "applauded the efforts of the School of Law, and law schools across the country, to change their curriculum to address declining passage rates." Is this really what we want? Do we prefer that the only law school in the state prepares its students for the bar exam, or prepares its students for practice in Montana? Would we rather our law school graduates be well-versed in common law inapplicable to Montana practice, or to Montana's unique laws? Teaching for the bar exam produces less qualified Montana attorneys. I learned *Montana's* remedies from Hon. James Nelson. I learned *Montana's* Constitution form Professors Andrew King-Ries and Anthony Johnstone. I learned *Montana's* civil procedure from Professor Cynthia Ford. Each of these classes prepared me to *practice* in Montana, but failed to prepare me for the Uniform Bar exam, and I am eternally thankful for that, despite my struggles in becoming licensed. Learning to practice and learning to pass an exam are two entirely different beasts, and to change the curriculum to slay the latter rather than the former is a very dangerous practice. I respectfully disagree with Mr.

Cox's applause, and urge that the new curriculum be viewed with extreme caution. It is much more important that graduates, the vast majority of whom will go on to practice in Montana, learn the law that they will practice, not the law upon which they will be tested for three days prior to practice.

Third, The exam was only required for Montana law school graduates after 1969. Several Montana attorneys, judges, and professors were therefore admitted to practice without ever having sat for a bar exam. How was their competence sufficiently measured? These are the attorneys that are currently teaching, mentoring, and judging. Why was the measure of their competence sufficient in 1966, but a score of 162 on an exam that does not even mention Montana law insufficient in 2016? Why is the method by which their competence was measured insufficient now?

In the Committee's Report, Mr. Cox explained that, "when the passing score was 260, the Board was routinely disturbed by the phenomenon of applicants who, though obtaining a marginal passing score on the exam, clearly did not 'adequately demonstrate that they had the skills to undertake the practice of law.'" *Report*, at 3. This statement directly contradicts the Committee's Findings. In fact, the Dean stated in his Memorandum that "[t]he Chair of [the] Working Group and [Dean Kirgis] asked the Board of Bar Examiners at a meeting in October 2015 whether they had evidence that applicants who score between 260-269 on the bar exam

perform less well as attorneys than those who score above 270, as might be demonstrated by lack of employment, bar complaints, legal malpractice claims, or any other metric. *We were told there is no evidence of such an effect. And it would be surprising if there were such an effect.*" *Memorandum*, at 6, emphasis added. Mr. Cox's assertions are therefore contradictory to any evidence, and his concerns appear to be unfounded.

According to the Committee's Report, the passing score was increased from 260 to 270 "premised upon a survey of the passing scores of states in our regions." Clearly, the actual score required for admission had nothing to do with any measure of competence, but everything to do with what our neighbors are doing. I therefore respectfully submit the question: Do we, as Montana attorneys and clients, care what Wyoming has set for its passing bar exam score? And if so, why, and what bearing should those concerns have on the primary purpose of the bar exam: to protect Montana consumers from incompetent attorneys? How is Wyoming's passing score a measure of competence to practice law in Montana? The premise of the passing score, as it was determined prior to the July 2013 exam, is entirely incongruous with the purpose of the exam.

Even Jamie Iguchi, who apparently has not felt the intense burn and bitterness of finishing seven years of advanced education, only to be held back by a single exam, admits that the exam is "*institutionalized hazing*," and "probably does not

measure one's ability to practice law," and is merely a "necessary evil." None of these statements speak strongly for maintaining the exam as it is, or reducing the required score by just four points. Rather than simply lowering the passing score by four points, I submit that the most necessary step in ensuring that attorneys are prepared for practice is a complete overhaul of the requirements to practice. Until that is possible, return the passing score to what was deemed sufficient for over forty years. If a score of 260 was a sufficient measure of competence before 2013, there is no indication that it is no longer a sufficient measure of competence.

Nothing prepares an attorney for practice more than law school, and nothing strengthens an aspiring attorney's skills and abilities more than actual practice. Currently, the University of Montana requires a specific number of hours of clinical practice prior to graduation. In my experience, this requirement is an effective method of teaching the practice of law, but, as implemented, woefully inadequate. Two semesters at eight hours per week is simply not sufficient to provide the student with anything more than mild frustration. Strengthening the program, and requiring some sort of apprenticeship – graded upon a strict rubric – would be infinitely more effective, and ensure competency, much more than 200 multiple choice questions ever could. Obviously such a program cannot be implemented immediately, but it is certainly something that could be worked towards.

The Report expressed concern over Montana becoming what could be termed a fall-back jurisdiction – one to which aspiring attorneys run because they cannot obtain a passing score in any other jurisdiction. Mr. Cox expressed "concern that a return to 260 would not adequately protect the public, would ensure a reputation for Montana as a bar exam of last resort, and was simply too low, given the Board's past experience." With all due respect, wages will ensure that Montana is not "a bar exam of last resort." No recent graduate, riddled with literally hundreds of thousands of dollars in student debt will choose to practice in Montana, where he or she would be lucky to start at $50,000/year. For example, Minnesota's passing score is 260, and starting wages in that state hover around $80,000/year. Certainly we can count on law school graduates who cannot attain a score of 270 and must therefore relocate, to choose the state that gives them the highest return. Sadly for those of us struggling to pay off student loans, Montana is not that state.

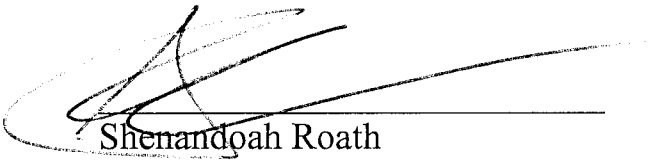
Finally, it troubles me that so little of the focus of the Committee was on the content of the exam. The UBE does not test the law that is practiced in Montana. Requiring the UBE for the practice of MT law is analogous to requiring a human foot surgeon to be tested on human hand anatomy: the parts and pieces are similar, but are an insufficient test of competence. Like feet and hands, common law and Montana law certainly have some parallels, but knowing one in depth provides no indication of competence in the other. As such, while I am aware that it is not

currently a goal, it is my personal belief that admission requirements should be entirely overhauled, and, while I am hesitant to say that the bar exam should be eliminated completely, I do not believe it, in its current form, is an adequate measure of competency to practice Montana law. Because a complete overhaul is unlikely and, even if implemented, would likely take several years, short-term solutions could include a reallocation of points on the Uniform Bar Examination – weigh the portions of the test that actually measure competency in practice greater, and the multiple choice portion less. Test Montana law. I attended a seminar at which most people were focused on anything but Montana law in order to gain admission. Review *Goetz v. Harrison*, 457 P.2d 911 (1969), and the "diploma privilege" it determined was unconstitutional. Is it possible to balance the exam with courses in Montana law that test competence to practice in Montana? Is there a way to teach for the bar exam *and* for practice in Montana to ensure competence in both?

I hope my comments do not offend, but are nonetheless considered thoughtfully. I thank the Committee, the Board of Bar Examiners, and the Montana Bar Association for their attention to this important matter, and I applaud this Court for its thorough efforts in patching the cracks in the system. Despite my personal struggle getting here, I do not regret my decision to practice law. I love being a lawyer, and, even though the road was extremely difficult, I am infinitely glad I chose to take that road. I agree that some measure insuring competence prior to

granting a license to practice law is absolutely necessary, and that it should be a difficult license to obtain, but I do not agree that the Uniform Bar Examination is the best way to do that.

DATED this 20th day of May, 2016.



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